Filed 8/3/09 R.S. v. Superior Court CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

R.S.,

Petitioner,

v.

THE SUPERIOR COURT OF STANISLAUS COUNTY,

Respondent;

STANISLAUS COUNTY COMMUNITY SERVICES AGENCY,

Real Party in Interest.

F057700

(Super. Ct. No. 515443)

O P I N I O N

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Nancy B. Williamsen, Commissioner.

Maria Elena Ramos, for Petitioner.

No appearance for Respondent.

John P. Doering, County Counsel, and Linda S. Macy, Deputy County Counsel, for Real Party in Interest.

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*Before Vartabedian, A.P.J., Cornell, J., and Kane, J.

Petitioner seeks an extraordinary writ (Cal. Rules of Court, rule 8.452) from respondent court's order issued at a contested dispositional hearing denying her reunification services pursuant to Welfare and Institutions Code section 361.5, subdivision (b)(10) and (11)[1] and setting a section 366.26 hearing as to her infant son S. We will deny the petition.

STATEMENT OF THE CASE AND FACTS

Petitioner is the mother of four children, K., H., M., and S. She has a long history of methamphetamine use, homelessness, and child neglect. In 2006, this court affirmed the juvenile court's order terminating petitioner's parental rights as to K. and H. (F050274). On our own motion, we take judicial notice of the appellate record in that case. (Evid. Code, § 459, subd. (a).)

The instant dependency proceedings were initiated in March 2009 when petitioner, while in prison for drug possession, gave birth to S. She told the social worker she no longer had custody of K., H., and M. because of her drug use and that she had been using methamphetamine, her drug of choice, since she was 12 years old. She also stated she used drugs until her arrest in July 2008 and was scheduled to be released from custody in July 2009.

The juvenile court ordered S. detained and set a jurisdictional/dispositional hearing. In its report for the hearing, the Stanislaus County Community Services Agency (agency) recommended the court deny petitioner services to reunify with S. pursuant to subdivisions (b)(10) and (11) of section 361.5 because of her failure to reunify with K. and H., her loss of parental rights to them and her failure to remedy the problems requiring their removal. Because the facts concerning K. and H.'s removal and ultimate

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

disposition are germane to the issues raised on this writ, we have included a summary of the dependency proceedings in their case.

Dependency Proceedings of K. and H.

In late July 2000, petitioner, homeless and heavily using methamphetamine, left then five-year-old K. and nine-month-old H. with a family friend who, in October 2000, became their legal guardian. In October 2002, petitioner, still homeless, gave birth to M. Both tested positive for marijuana. The matter was referred to the agency and petitioner agreed to voluntary services but her case was closed the next month after her whereabouts became unknown. M. remained in her custody.

In June 2004, the agency took K. and H. into protective custody because a member of the guardian's household sexually molested several female family members and the guardian was aware of the molestation. The agency filed a dependency petition on behalf of K. and H., alleging the guardian failed to protect them from sexual abuse and petitioner's whereabouts and ability to provide for them was unknown.

Petitioner appeared at the detention hearing and subsequently told the social worker she participated in drug treatment after M.'s birth and had been clean and sober for a long time. At the agency's request, petitioner completed a substance abuse assessment and, according to the substance abuse counselor, she tested negative for drugs and did not need substance abuse treatment.

In September 2004, at the dispositional hearing, the juvenile court ordered K. and H. removed from the guardian and petitioner's custody and set aside the guardianship. The court ordered petitioner to complete a parenting program and authorized overnight visitation.

In December 2004, petitioner kicked H. several times in the head leaving a mark. That same month, the agency asked petitioner to drug test. She complied but did not provide enough of a sample and refused to try again. In February 2005, the juvenile court

continued petitioner's services to the 12-month review hearing and modified her case plan to include anger management counseling and random substance abuse testing at the discretion of the social worker.

In its 12-month review, the agency recommended the juvenile court terminate petitioner's reunification services for K. and H. The agency reported K. found a glass pipe in petitioner's room that was loaded with methamphetamine. The agency also reported petitioner began parenting classes in November 2004 and attended three of six classes before she quit attending. She began attending parenting classes again in January 2005 but was dropped from the program the following month for nonattendance. In addition, petitioner did not follow through on her referral for anger management. In July 2005, at the 12-month review hearing, the juvenile court terminated petitioner's reunification services and set a section 366.26 hearing as to K. and H.

Following termination of petitioner's reunification services, M. remained in her custody and, in March 2006, the agency received a report that petitioner was prostituting herself and using drugs. In addition, she was leaving M. with friends and M. was showing signs of sexual abuse and aggression. In April 2006, petitioner's parental rights to K. and H. were terminated. In November 2006, the agency was notified that a legal guardianship for M. was initiated in the superior court. That same month, petitioner was convicted for possession of controlled substance paraphernalia. In March 2007, K. and H. were formally adopted. In July 2008, petitioner was convicted for transporting a controlled substance and sentenced to two years in prison. The following March, she gave birth to S.

Contested Jurisdictional/Dispositional Hearing as to S.

Petitioner challenged the agency's recommendation that the juvenile court deny her reunification services and argued at a contested jurisdictional/dispositional hearing in May 2009 that she made reasonable efforts while incarcerated to address her problems

and provide for S.'s safety. Petitioner's attorney argued petitioner found out she was pregnant after she was incarcerated. At that point, she began attending Narcotics Anonymous/Alcoholics Anonymous meetings and inquired about two substance abuse programs. However, she was denied access to the programs because of her criminal history. Petitioner also placed her name on a waiting list for a parenting class. Petitioner's attorney also argued the court, in determining whether petitioner made reasonable efforts, should consider that the problems petitioner was required to correct in K. and H.'s case were parenting and anger management while the issue in S.'s case was substance abuse.

At the conclusion of the hearing, the juvenile court adjudged S. a dependent of the court and ordered him removed from petitioner's custody. The court denied petitioner reunification services pursuant to section 361.5, subdivision (b)(10) and (11) and set a section 366.26 hearing to implement a permanent plan. This petition ensued.

DISCUSSION

Petitioner contends the juvenile court erred in denying her reunification services under section 361.5, subdivision (b)(10) and (11) because K. and H. were not removed from her custody and because she made reasonable efforts to remedy her problems. Alternatively, she contends, the juvenile court abused its discretion in not finding reunification would serve S.'s best interest. We disagree.

The juvenile court is required to order family reunification services whenever a child is removed from the custody of his or her parent unless the court finds by clear and convincing evidence that the parent is described by any of 15 exceptions set forth in section 361.5, subdivision (b). (§ 361.5, subds.(a) & (b)(1)-(15).) Subdivision (b)(10) of section 361.5 (subdivision (b)(10)) authorizes the denial of reunification services if the court finds,

> "[t]hat the court ordered termination of reunification services for any siblings or half siblings of the child because the parent … failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and … this parent … has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent …."

Subdivision (b)(11) of section 361.5 (subdivision (b)(11)) is similar in that it authorizes the denial of reunification services to a parent whose parental rights have been "permanently severed" as to a sibling or half sibling of the child and that parent "has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling."

"'On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order.' [Citation.] Section 361.5, subdivision (b) requires bypass findings to be supported by clear and convincing evidence. '"The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." [Citations.]'" (*In re Angelique C.* (2003) 113 Cal.App.4th 509, 519.)

Petitioner does not dispute that subdivision (b)(10) and (11) applies to her insofar as her reunification services for and parental rights to K. and H. were terminated. Rather, she contends her circumstances do not satisfy the additional requirement that K. and H. were removed from her custody. She argues they were removed from the guardian. In fact, K. and H. were residing with their guardian when they were taken into protective custody in 2004. However, the juvenile court ordered them removed from the guardian and petitioner at the dispositional hearing. A minute order from that hearing attests to

that. Consequently, the requirement the juvenile court find that K. and H. were removed from petitioner's custody for purposes of applying subdivision (b)(10) and (11) was met.

Further, the evidence also reflects petitioner failed to make reasonable efforts to resolve the problems necessitating K. and H.'s removal. Though the juvenile court did not identify the problems necessitating K. and H.'s removal, we can infer them from the record. Petitioner had a long history of drug abuse, homelessness, and neglect. In addition, K. and H. had been in the care of the guardian for approximately four years. Consequently, petitioner's ability to safely parent them was in question and formed the basis for their removal.

Moreover, at no time after K. and H.'s removal did petitioner make a reasonable effort to improve and demonstrate her parenting skills. She refused to participate in services to reunify with them, resulting in termination of her services and loss of her parental rights. Even then, petitioner made no effort to safely parent M., the one child still in her custody. Instead, she exposed him to her life of drug abuse until she was incarcerated and apparently forced to place him in legal guardianship. It was not until petitioner was incarcerated and facing the loss of S. that she took some initiative to get help. However, those efforts are not reasonable when one considers the many opportunities petitioner had to prove herself a responsible parent and chose not to and the fact that she had to be taken into custody before she demonstrated any interest in being a parent. On these facts, we conclude petitioner failed to make subsequent reasonable efforts and denial of reunification services was warranted under both subdivision (b)(10) and (11).

Further, we find no abuse of discretion in the juvenile court's refusal to order reunification services. Section 361.5, subdivision (c) grants the juvenile court discretion to order reunification services despite the applicability of subdivision (b)(10) or (11) if it determines, by clear and convincing evidence, that reunification is in the child's best

interest. As discussed above, petitioner failed to address her underlying problems and there was not a reasonable basis upon which the juvenile court could conclude petitioner's relationship with S. could be saved. Under those circumstances, S.'s best interest could only be served by proceedings to implementation of a permanent plan. Accordingly, we find no error on this record.

DISPOSITION

The petition for extraordinary writ is denied. This opinion is final forthwith as to this court.